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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MILTON S. KRONHEIM & CO., INC.,
Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

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BRIEF IN OPPOSITION BY THE DISTRICT OF COLUMBIA

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, Pet. App. 1a-40a,[1] is reported at 91 F.3d 193 (D.C. Cir. 1996).

COUNTER-STATEMENT OF THE CASE

A. The Legislative Scheme

1. The ABC Act

On January 24, 1934, less than two months after Prohibition was repealed by the Twenty-first Amendment, Congress, in an

[1] "Pet. App." references are to the Appendices to the Petition.

exercise of its plenary legislative authority over the District of Columbia (the "District"),[2] enacted the District of Columbia Alcoholic Beverage Control Act, (the "ABC Act").[3] During the debates, the Act was referred to as a "model bill, which will be considered by all of the 48 States of the Nation when they are considering legislation for the sale of intoxicating beverages in those States." 78 CONG. REC. 266 (1934) (remarks of Congressman Patman).

The ABC Act establishes a three-tier system of distribution, which separately licenses manufacturers, wholesalers, and retailers, and requires retailers, with limited exceptions, to purchase only from licensed wholesalers. *See* D.C. Code §§ 25-109(a)(1), 25-113, 25-119, 25-120[4]; *cf. Healy v. The Beer Institute, Inc.*, 491 U.S. 324, 326 n.2 (1989). Thirty-two states opted for a similar distribution system; the other 18 states (the "control" states) made the state the only wholesaler. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 576 n. 1 (1986).

The Act provides that "[e]very license shall particularly describe the place where the rights thereunder are to be exercised, and beverages shall not be sold or kept for sale . . . by any licensee except at the place so described in his license . . . ," D.C. Code § 25-114(e), and only authorizes wholesalers to sell alcoholic beverages "from the place therein described." D.C. Code § 25-111(a)(3), (4). That the term "place," as used in these sections, was intended to mean a

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[2]U.S. CONSTITUTION, Art. I, § 8, cl. 17.

[3]Act of January 24, 1934, 48 Stat. 219, ch. 4; D.C. Code § 25-101 *et seq.* (1996).

[4]There are currently no manufacturers in the District; there are 9 wholesalers, which distribute to over 1,400 retailers.

place within the District is clear from a reading of other provisions of the Act. The scope of the Act is limited "only to the District of Columbia." D.C. Code § 25-102. A license issued to a wholesaler permits it only to "keep for sale, or sell any alcoholic beverage" "within the District of Columbia." D.C. Code §§ 25-109(a)(1). Provisions designed to ensure that granting a license will not have an adverse impact on the neighborhood only make sense if the "place" is within the District. *See* D.C. Code § 25-115(b)(1) (requiring Board to consider whether location is appropriate, considering surroundings and desires of the neighborhood), and D.C. Code § 25-116(b) (prohibiting issuance of wholesaler's license in "residential use district" as defined by District's zoning regulations).

Moreover, the strong enforcement provisions in the Act for the most part can only be exercised with respect to premises in the District. Thus, the Act authorizes the District Government to seek a search warrant "when any alcoholic beverages are manufactured for sale, kept for resale, or sold in violation of the provisions of this Act"; it empowers police officers to "break open any outer or inner door or window . . . to execute the warrant" if refused entry after notice; it provides criminal penalties for obstructing the officers; and it permits seizure, forfeiture, destruction, and liens upon property stored in violation of the Act. D.C. Code § 25-129(a), (e), (g), (n), (o), (p). *See* D.C. Code § 4-138 (1994) (Metropolitan Police Department can only execute warrants in the District). The Act also provides that any "building, ground, premises, or place where any intoxicating beverage is manufactured, sold, kept for sale, or permitted to be consumed in violation of this Act is hereby declared to be a nuisance, and may be enjoined and abated as hereinafter provided" and authorizes the Superior Court to order the nuisance abated and to close the

premises down for one year. D.C. Code § 25-139; *see* D.C. Code § 23-521(a) (1996) (Superior Court can issue warrants only for premises in District).

The Act establishes an Alcoholic Beverage Control Board (the "Board") with authority to issue, transfer, and revoke all licenses under the Act. D.C. Code §§ 25-104, 25-106. It also authorizes the D.C. Commissioners (now the Council of the District of Columbia)--but *not* the Board--to adopt rules to "control and regulate the manufacture, sale, keeping for sale, offer for sale, importation, exportation, and transportation of alcoholic beverages in the District of Columbia," and to "forbid the issuances of [such] licenses . . . in such localities in . . . the District of Columbia as they may deem proper in the public interest." D.C. Code § 25-107(a), (b).

2. The Storage Act

In 1986, the Council of the District of Columbia, exercising legislative power delegated to it by Congress under the District of Columbia Self-Government and Governmental Reorganization Act,[5] amended the ABC Act by enacting the Wholesale Liquor Storage Act of 1986, D.C. Law 6-130, D.C. Stat. 327 (1986) (the "Storage Act"), which provides, in pertinent part, that "[n]o licensee may store beverages upon premises outside the District . . ." D.C. Code § 25-114(f). The legislative history of the Storage Act shows that the Council understood that the ABC Act, as enacted by Congress, already required wholesalers to store beverages within the District, and that one of the primary purposes of the Storage Act was to make it clear that the Board's authority to permit wholesalers to "store beverages . . . upon premises other than the

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[5]PUB. L. No. 93-198, 87 Stat. 774 (1973). *See id.* §§ 302, 404(a), D.C. Code §§ 1-204, 1-242(a) (1992).

premises designated in the license" under D.C. Code § 25-114(e) was limited to premises within the District. The legislative history also shows that the legislation was in part in response to two specific instances in which the Board had exceeded its authority by permitting two wholesalers to store beverages outside the District in violation of the ABC Act.

During first reading of the Storage Act, Councilmember Ray, the Chairman of the Committee on Consumer and Regulatory Affairs, which reported that Act, responded as follows to initial concerns by Councilmember Schwartz that one of the purposes of the bill was economic protection:

> . . . The interest that we have, Mrs. Schwartz, is to audit the records of these companies, to check their warehouses to make sure that they're in compliance with the ABC laws of the District of Columbia, to make sure their licenses are posted correctly, to check each and every truck they own to make sure their licenses are posted correctly, to make sure all the lettering and number of these trucks are correct and in accordance with our licensing laws, to make sure that their tax forms are file[d] so that we can audit to make sure that they're paying the proper taxes to the District of Columbia because taxes are based upon the gallons they sell per year, and all other laws which comply with the District of Columbia.
>
> Obviously, the District of Columbia inspectors have no control over interest[s] that are located in Maryland and Virginia. So, that's why this law is important not only Mrs. Schwartz from an economic reason, but from a regulatory reason, which is a function of the ABC Board in this city.

> At the end of this, Mr. Chairman, I would like to add a statement to the record that this decision goes much further than economic reasons, but it's a result of a boneheaded decision made by the ABC Board, which interprets the laws as allowing them to exempt a couple of companies from our laws.
>
> The law already requires that all of those companies be in the city. The companies that are here now cannot leave this city unless we so exempt them. This law is to make it clear that the Alcoholic Beverage Control Board does not have that authority and we did not intend for them to exempt these companies.

Pet. App. 85a-86a. *See also*, *id.* at 87a-89a. The bill passed on first reading by unanimous vote. *See id.* at 90a.

After the Council, at second reading, adopted an amendment proposed by Councilmember Winter permanently exempting wholesalers that had previously received a waiver, Councilmember Ray, vigorously opposing this amendment as destructive of the Storage Act, reiterated his position in a letter to the Council urging the deletion of this amendment:

> . . . [T]he ABC Board's decisions permitting Quality and Majestic to warehouse outside the District contravened the intent of the law and usurped powers reserved to the Council. D.C. Code [§] 25-107(b) authorizes the Council--and only the Council--to make all Alcoholic Beverage Control rules and regulations. The Council is specifically authorized "to forbid the issuance of licenses for . . . storage of alcoholic beverages in such localities in, and such sections and portions of, the District of Columbia as the Council may deem proper in the public interest.

> . . ." From this language, and other references to the District of Columbia throughout the act, *it is clear that Congress, in writing the law, had no intention of permitting District licensees to operate outside the District.* By permitting otherwise, the ABC Board made a policy decision expressly reserved for the Council. If we are genuinely committed to protecting our legislative prerogatives, we cannot come along now and condone the ABC's usurpation of Council authority.

Res. App. 8a (emphasis added).[6]

Mr. Ray's letter apparently persuaded the Council, for, at third reading of the Act, the Council voted without opposition to delete the previous amendment, restoring the Act to its original form. *See* Res. App. 18a. Other members shared Councilmember Ray's view that the Board lacked authority to grant such "waivers." As Councilmember Kane stated:

> I just wanted to say for the record, I will be supporting Mr. Ray's amendment. It has been my understanding at the time of the previous vote that the exemption or the exception for being out of the city had been properly granted.
>
> I have received information since that indicates it's really some question about how properly and how legally that exemption was granted in the first place.
>
> I, like Mrs. Schwartz, am not in the habit of changing the rules on people in the middle of the

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[6]"Res. App." references are to the Appendices bound at the end of this Brief.

> game. It seems that there was some question about whether or not the rules were been followed in the first place.

Res. App. 16a-17a. The Storage Act passed on final reading by unanimous vote. *Id.* at 18a.

B. The Facts

Petitioner, Milton S. Kronheim & Co., Inc., (Kronheim) is a wholesaler of alcoholic beverages, licensed under the ABC Act. Kronheim distributes liquor, beer, and wine to District retailers, which it obtains from approximately 80 suppliers, and has conducted its wholesale beverage business in the District continuously since 1903, except during Prohibition. *See* Pet. App. 91a. Kronheim's licenses authorize it to store alcoholic beverages at two warehouses located on V Street, N.E. in the District of Columbia. *Id.* at 92a-93a. Kronheim has a Maryland affiliate based in Baltimore and, for business reasons, desired to consolidate its warehousing operations in the District and Maryland by leasing a facility in Jessup, Maryland. *Id.* at 92a, 97a.

On February 2, 1995, Kronheim filed a suit in the United States District Court for the District of Columbia to declare the Storage Act unconstitutional as violative of the Commerce Clause.[7] In support of Kronheim's motion for a preliminary injunction, Matthew Margolies, Kronheim's Chief Executive Officer, stated in an affidavit that Kronheim's District operations required 100,000 square feet and that no such warehouses were available in the District. Pet. App. 93a. However, Frederick Farshey, a commercial developer, stated to the contrary that adequate warehouse space was available, includ-

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[7]U.S. CONSTITUTION, Art. I, § 8, cl. 3.

ing the Sears Building, which was vacated about two years previously and which had 225,000 square feet available since February, 1995. Res. App. 20a.

On February 10, 1995, after a short hearing primarily on the issues of irreparable harm and balance of the equities, the district court granted a preliminary injunction, which was subsequently superseded by an permanent order, declaring the Storage Act unconstitutional and enjoining its enforcement. *Milton S. Kronheim & Co., Inc. v. District of Columbia*, 877 F.Supp. 21 (D.D.C.), *rev'd*, 91 F.3d 198 (D.C. Cir. 1996).[8]

The D.C. Circuit reversed,[9] holding that, although it facially discriminated against interstate commerce, the Storage Act was constitutional because "both by its terms and according to its history [it] is designed to advance the core enforcement purposes protected by section 2 of the Twenty-first Amendment." *Milton S. Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d at 193, 203 (D.C. Cir. 1996); Pet. App. 18a. The Circuit noted that core enforcement interests advanced by the Act included facilitating the auditing of company records, monitoring compliance with the ABC laws, monitoring licenses, and checking tax forms for audits. *Id.*, 93 F.3d at 203; Pet. App. 19a. The Circuit denied Kronheim's petition for rehearing and suggestion for rehearing in banc. Pet. App. 64a, 65a.

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[8]The district court relied primarily on the decision of the decision in *Quality Brands, Inc. v. Barry*, 715 F.Supp. 1138 (D.D.C. 1989), *aff'd mem.*, 901 F.2d 1130 (1990).

[9]Judge Henderson dissented solely on the collateral estoppel issue and would not have reached the constitutional issues.

REASONS FOR DENYING THE PETITION

THE STORAGE ACT IS CONSTITUTIONAL BECAUSE IT IS DESIGNED TO ADVANCE IMPORTANT ENFORCEMENT PURPOSES OF THE DISTRICT CONCERNING ALCOHOLIC BEVERAGES UNDER SECTION 2 OF THE TWENTY-FIRST AMENDMENT.

A. The states and District have broad power under the Twenty-first Amendment to structure the liquor distribution system within their borders.

The D.C. Circuit was correct in upholding the Storage Act against challenge under the Commerce Clause because it is supported by core concerns under Section 2 of the Twenty-first Amendment, which provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.[10]

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[10]The D.C. Circuit held that, although the District may not literally be a "State" within the meaning of Section 2 of the Twenty-first Amendment, it must be treated as such because Congress delegated to the District the same powers given to the states under the Twenty-first Amendment. *Kronheim*, *supra*, 91 F.3d at 201; Pet. App. 13a. Kronheim concedes that this holding is correct. Petition at 9 n. 4. This delegation of congressional power is supported not only the ABC Act, which Congress considered a "model" for the states, *see*, *supra*, p. 2, but also by the District of Columbia Self-Government and Governmental Reorganization Act, PUB. L. No. 93-198, 87 Stat. 774 (1973), which provides that:

Kronheim argues that this provision is "primarily designed to permit the states 'to promote temperance.'" Petition at 12, *citing Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). But, although promoting temperance may be one object, Section 2 has a broader reach. In *Bacchus*, while invalidating a state law providing a tax exemption for locally produced beverages, the Court recognized that a state could justify "its tax on the ground that it was designed to promote temperance *or to carry out any other purpose of the Twenty-first Amendment*." *Id.* at 276. (Emphasis added.) Indeed, despite Kronheim's attempt to belittle the text of the Twenty-first Amendment, it is significant that Section 2 does not mention "temperance" at all, but uses the words "transportation," "importation," and "delivery."

The Supreme Court has consistently held that the Twenty-first Amendment gives the states broad power to structure the distribution system for alcoholic beverages within their borders. Thus, in *State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 62 (1936), the Court upheld a license fee for the privilege of importing beer into California, observing that the Amendment "confer[]s upon the

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> . . . [T]he legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution of the United States.

Id. § 302; D.C. Code § 1-204 (1992). Kronheim's concession, however, means that, strictly speaking, this case does not construe the Twenty-first Amendment at all but, instead, a statutory analogue to it unique to the District of Columbia.

state the power to forbid all importations which do not comply with the conditions which it prescribes." In *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), the Court upheld a Kentucky statute regulating the distribution of alcoholic beverages against challenge by a carrier that was not licensed by the state to transport alcohol from distillers out of the state, holding that "[t]he Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."

More recently, although invalidating patently protectionist state regulations or those running afoul of important constitutional provisions other than the Commerce Clause, the Court has consistently recognized, in strong dicta, that a state's regulation of the importation and distribution of alcoholic beverages within its borders is a core power, which may be exercised free of the Commerce Clause. Thus, in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964), although invalidating a tax imposed by Kentucky on imported whiskey as violative of the Export-Import Clause, the Court stated that "[t]here can surely be no doubt . . . of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported." In *Craig v. Boren*, 429 U.S. 190, 205-207 (1976), although invalidating a law mandating different ages for drinking for men and women on equal protection grounds, the Court stated that the "importation of intoxicants [is] a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." In *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), although invalidating a state price affirmation plan because of its practical effect on the commerce of other states, the Court stated that "Section 2 'grants the States virtually complete control over whether to permit importation

or sale of liquor and how to structure the liquor distribution system.'" *Id.* at 346, *quoting California Retail Liquor Dealers Assoc. v. Midcal Aluminum*, 445 U.S. 97, 110 (1980). In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S 691 (1984), although invalidating a state ban on cable television advertisements of alcoholic beverages as preempted by federal communications law, the Court observed that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders" and that "§ 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Id.* at 712, *citing Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964). And in *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495, 1514 (1996), although invalidating a ban on advertising liquor prices on First-Amendment grounds, the Court reaffirmed that "[t]he States' regulatory power over this segment of commerce is therefore largely 'unfettered by the Commerce Clause.'" *Quoting Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

Likewise, in *North Dakota v. United States*, 495 U.S. 423, 431 (1990), the Court, in upholding North Dakota's reporting and labeling requirements for liquor imported into military bases within the state against challenges that they burdened the federal government in violation of the Supremacy Clause, held that "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." Noting that the state's "comprehensive system for the distribution of liquor within in its borders" was "unquestionably legitimate," it held that the reporting and labeling requirements "fall within the core of the State's power under the Twenty-first Amendment." *Id.*, 495 U.S. at 432.

In view of these cases, there can be little doubt that a state law designed to structure the distribution system of alcoholic beverages, whether or not it directly promotes temperance, is an exercise of a core power under Section 2 of the Twenty-first Amendment and, thus, is not subject to challenge under the dormant Commerce Clause.[11]

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[11]We continue to maintain that Congress itself required wholesalers to store alcoholic beverages in the District when it enacted the ABC Act in 1934, and that the Storage Act simply clarified the scope of the Board's discretion to permit a licensed wholesaler to store beverages in places not designated in the license was limited to places in the District. It is settled that the Commerce Clause does not apply to Acts of Congress, including those enacted in the exercise of its legislative power over the District under Article I, § 8, cl. 17 of the Constitution, unless Congress expressly limits its power. *See Neild v. District of Columbia*, 110 F.2d 246, 251 (D.C. Cir. 1940); *accord*, *Mercury Press v. District of Columbia*, 173 F.2d 636, 637-638 (D.C. Cir. 1948), *cert. denied*, 337 U.S. 931 (1949).

The D.C. Circuit agreed that Congress exercised its full legislative powers when it enacted the ABC Act, *Kronheim*, *supra*, 91 F.3d at 200; Pet. App. 11a, but concluded that "the ABC Act neither mandates nor forbids the storage limitation." *Id.*, 91 F.2d at 200; Pet. App. 13a. We disagree. "[L]ook[ing] to the provisions of the whole law, and to its objects and policies," *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987), especially provisions limiting the scope of the ABC Act, the scope of the licenses issued thereunder, and the ability to enforce the Act's provisions to the geographic boundaries of the District, *see*, *supra*, pp. 2-4, it is apparent that the "place" where the Act requires wholesalers to store their beverages is necessarily a place within the District and, hence, that Congress itself imposed the storage requirement. Therefore, this case should have been decided on non-constitutional grounds.

B. The Storage Act is designed to advance core enforcement purposes protected by the Twenty-first Amendment pertaining to the structuring of the liquor distribution system within the District.

As the D.C. Circuit noted, "the Storage Act both by its terms and according to its history is designed to advance the core enforcement purposes protected by Section 2 of the Twenty-first Amendment." *Kronheim*, *supra*, 91 F.3d at 203; Pet. App. 18a. The Act effectively controls the "transportation or importation" of "intoxicating liquors" into the District from manufacturers for "delivery or use therein," within the meaning of Section 2, by channeling alcoholic beverages imported into the District in bulk to the storage facilities of a small number of wholesalers before the beverages are delivered to numerous retailers within the District, thus permitting the District to enforce compliance with the ABC Act and tax laws. As this Court held in *Capital Cities Cable*, *supra*, 467 U.S. at 716, a "State's central power under the Twenty-first Amendment [is] regulating the times, places, and manner under which liquor may be imported and sold. . ." Since the Storage Act regulates the "place" and "manner under which liquor may be imported," it is within this central power.

Requiring a local situs for wholesalers is an integral part of the three-tier distribution system because it serves the ultimate purpose of licensing--ready access to and power over the licensee and its activities. As explained in F. SWITZER, *The Three-Tier System of Distribution in the Wine and Spirits Industry* 10 (1975):

> The [three-tier] system also required an independent, locally licensed wholesaler to be the first buyer within the state and established a clear-cut channel of distribution. The wholesaler, being within the juris-

> diction of the state, would obviously be more amenable to state control and more sensitive and responsive to local social influences than would a non-resident supplier operating at a national level. This system strengthened the hand of the state in enforcing its regulatory provisions and in achieving the social ends of liquor control. It more fully utilized the full legal power of the state over the channels of distribution to meet the requirement of sound liquor control.
>
> It is obviously simpler for a state to enforce the laws against local, licensed wholesalers than against suppliers--be they distillers, wineries, or importers--located outside the state. The state can walk into the wholesale house, inspect its books, examine its inventory and question its officers and employees. It has immediate jurisdiction over all the operations and personnel of the wholesaler. It may suspend or terminate all its operations. . . .

One of the most compelling arguments that the Storage Act serves a core purpose of the Twenty-first Amendment is the undisputed fact that every state in the country which permits private wholesalers to operate at all has a similar requirement. As the D.C. Circuit observed, "[e]loquently testifying to the legitimacy of the District's claims, as well as to the potentially dire consequences of the precedent we might establish by striking the Act, are an array of state statutes subject to potential attack on the same Commerce Clause basis." *Kronheim*,

supra, 91 F.3d at 204; Pet. App. 19a-20a (citing state statutes).[12]

Indeed, North Dakota's "comprehensive system for the distribution of liquor within in its borders," a three-tier system, which the Court found "unquestionably legitimate" in *North Dakota v. United States*, *supra*, 495 U.S. at 432, like the Storage Act and the state statutes cited by the D.C. Circuit, provides that "[a] person is not eligible for such a license unless that person has a warehouse and office in this state . . ." N.D. Centennial Code § 5-03-01 (1995). More pointedly, Judge Scalia, whose concurring vote made up the majority, stated that "[t]he Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed *in-state* wholesaler"). *Id.* at 447 (SCALIA, J., concurring) (emphasis added).[13]

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[12]Indeed, Section 2 permits states to monopolize the distribution of alcoholic beverages, and 18 states have done so. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, *supra*, 476 U.S. at 576 n. 1. If the District may make itself the sole wholesaler for all alcoholic beverages distributed in the District, it surely may take the lesser action of requiring all private wholesalers to store their beverages in the District prior to distributing them to retailers. *See Ziffrin, Inc. v. Reeves*, *supra*, 308 U.S. at 138 ("The greater power includes the less."); *State Board of Equalization of California v. Young's Market Co.*, *supra*, 299 U.S. at 63 (same).

[13]Although the Court was divided on the question of whether the state labeling (though not the reporting) requirement for military bases burdened federal operations, there was no dissent about the legitimacy of North Dakota's comprehensive scheme. In arguing that the labeling requirement for liquor shipped to military bases was not necessary, the dissenting Justices stated that "[t]he State could achieve the same result in its effort to 'prevent the unlawful diversion of liquor into [its] regulated

Therefore, there is no merit in Kronheim's argument that this case presents a novel question about the scope of the core interests protected by the Twenty-first Amendment. The Storage Act is not merely a "general state interest in facilitating enforcement" of ABC laws, as Kronheim asserts, but a key part of the District's power to structure the liquor distribution system within its borders. If the storage requirement is not an exercise of a core power to structure the liquor distribution system, it is difficult to imagine what is.

C. The D.C. Circuit's holding that the Storage Act is designed to advance core enforcement powers over alcohol was properly based on the terms of the Act, its legislative history, and the adoption of a similar requirement by numerous states.

Kronheim's argument that a state relying on the Twenty-first Amendment is "required to adduce evidence that the law actually and materially served core Twenty-first Amendment interests," Petition at 18-19, is untenable.[14] The District was not required to meet such a burden. As this Court held in *North Dakota v. United States*, *supra*, "[g]iven the protection afforded the state liquor control policies by the Twenty-first Amendment, they are supported by a *strong presumption of validity* and should not be set aside lightly." *Id.* 495 U.S. at 434, *citing Capitol Cities Cable, Inc. v. Crisp*, *supra*, 467 U.S. at 714 (emphasis added). The D.C. Circuit properly

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Id. at 449-450 (BRENNAN, J., dissenting) (emphasis added). This language assumes that the liquor would be shipped to a situs within the state, and not distributed to retailers from outside the state, in which case it would be difficult to prevent diversion.

[14]We note that Kronheim did not raise this argument before the district court or even before the Panel of the D.C. Circuit, but did so for the first time in its rehearing petition.

434, *citing Capitol Cities Cable, Inc. v. Crisp*, *supra*, 467 U.S. at 714 (emphasis added). The D.C. Circuit properly based its holding that the Storage Act was designed to advance core alcoholic beverage enforcement purposes on the terms of the Act, its legislative history, and the adoption of a similar requirement by numerous states.

Moreover, the cases Kronheim cites, *Midcal Aluminum*, *Capital Cities Cable*, and *324 Liquor Corp.*,, do not support this argument because the Court did not place the burden of persuasion on the State. Instead, the Court determined that the states' purported interests were weak or nonexistent as a matter of law when balanced against the federal interests.[15] Thus, in *Midcal Aluminum*, the Court noted that "*[n]othing* in the record of this case suggests that the wine pricing system helps sustain small retail establishments." *Id.*, 445 U.S. at 113 (emphasis added). In *Capital Cities Cable*, the Court "accept[ed] Oklahoma's judgment that restrictions on liquor advertising represent at least a reasonable, albeit limited, means of furthering the goal of promoting temperance in the State," but found that "*[b]y their own terms* . . . the State's regulatory aims in this area are narrow." *Id.*, 467 U.S. at 715 (emphasis added). And in *324 Liquor Corp.*, the Court held that a New York State price affirmation law requiring a minimum 12 percent markup on the posted bottle price and which purported to protect small retailers was not protected by the Twenty-first Amendment because "[t]here is *no indication in the statute or its legislative history* . . . that the purpose of

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[15]The relevance of these cases is further attenuated since they all involved conflicts of state laws with federal concerns other than the Commerce Clause because "the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Craig v. Boren*, *supra*, 429 U.S. at 206.

defining cost as 'posted bottle price' was to protect small retailers." *Id.*, 479 U.S. at 349 (emphasis added).

In the present case, as shown, there is ample support in the terms and legislative history of the Storage Act that it furthers important enforcement interests integral to the structuring of the liquor distribution system in the District by channeling alcoholic beverages imported into the District to warehouses operated by a few wholesalers before they are delivered to numerous retailers.[16]

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[16]Indeed, although we do not believe the balancing approach taken in these cases is warranted since the Storage Act is designed to advance a core Twenty-first Amendment interest, applying a balancing approach supports the argument in favor of the constitutionality of the Storage Act because the federal interests that would be advanced by invalidating it are so minimal. The Storage Act does not discriminate against out-of-state goods since all liquor consumed in the District is manufactured outside the District. It does not discriminate against out-of-state labor since the District does not have a residency requirement for licensees. And it does not discriminate against out-of-state wholesalers since the requirement only applies to local wholesalers because only they can distribute alcoholic beverages in the District in the first place. Thus, this case is quite different from *Bacchus Imports, Ltd. v. Dias*, *supra*, in which the Court invalidated a tax exemption for certain local manufacturers which put a wholesaler of the out-of-state beverages at a competitive disadvantage. Here, by contrast, Kronheim is not competitively disadvantaged by the storage requirement because it applies across the board. Moreover, since every state requires wholesalers to store alcoholic beverages in the state prior to delivering them to retailers, the Storage Act cannot, as a practical manner, operate in a discriminatory manner. Thus, this case is distinguishable from those involving local processing requirements, such as *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994), which held that "the essential vice in laws of these sorts is that they bar the import of the processing service [and] hoard a local resource--

As noted, the enforcement interests underlying the Storage Act are clear from its legislative history. Kronheim's assertion that the District's interests were only made in "the eleventh-hour statement of single District Councilmember in anticipation of litigation," Petition at 13, is a serious misstatement of the record.[17] As shown, Councilmember Ray's explanation of the interests served by the Storage Act was thoroughly aired at three legislative sessions of the Council and in a letter to all of its members. Despite some initial concerns by Councilmembers Schwartz and Kane, in the end they were satisfied because they, as well as the rest of the Council, voted unanimously in favor of the Act. *See* Res. App. 18a. Debate among the members of a legislative body considering an

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be it meat, shrimp, or milk--for the benefit of local businesses that treat it." Unlike the businesses burdened in these cases, Kronheim is, and as part of the required liquor distribution system is required to be, a "local business" It is for that reason that Kronheim clearly has free "access to local demand" of its beverages. Since the in-state storage requirement is universally imposed on all alcoholic beverage wholesalers in the United States, no wholesaler is competitively disadvantaged by this requirement. For these, and other reasons, we continue to maintain that the Storage Act would not violate the Commerce Act even in the absence of the Twenty-first Amendment because it "regulates evenhandedly to effectuate a legitimate local purpose." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). What Kronheim seeks is a competitive advantage over other District-licensed wholesalers, but the Commerce Clause does not entitle it to this advantage.

[17]Equally unsupported is Kronheim's assertion that Mr. Ray's statements were made in contemplation of litigation. No potential litigation was apparent at the time. Indeed, it was not until July 20, 1988--over two years after the Council enacted the Storage Act--that a wholesaler filed a suit challenging it. *See Quality Brands, Inc. v. Barry, supra.*

enactment is one of the best indications of legislative intent. *See Symons v. Chrysler Corp. Loan Guarantee Board*, 670 F.2d 238, 242-243 (D.C. Cir. 1981).[18]

Kronheim's argument that Twenty-first Amendment principles are inapplicable here because the object of the Storage Act's thrust is warehouse space, rather than alcoholic beverag-

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[18]Kronheim makes several other assertions that require response. Petition at 12-13 at n. 8. (1) Kronheim's assertion that there are no ABC laws pertaining to activities at warehouses misses the point. Instead of specific regulations, various provisions of the ABC Act give governmental entities broad *discretion*, including those giving the Board discretion to approve the location of a wholesaler's premises within the District, D.C. Code §§ 25-115(b)(1), 25-116(b); authorizing the police to enter wholesaler's premises to investigate possible violations, D.C. Code § 25-129; and authorizing the Superior Court to close down premises in violation of the ABC Act. D.C. Code § 25-139. *See*, *supra*, pp. 3-4. (2) Kronheim's assertion that the District never inspected a warehouse in the past is based entirely on a bald and self-serving statement of Kronheim's Chief Executive Officer in an affidavit in which the focus of the evidence was the question of irreparable harm. Pet. App. 100a. (3) Kronheim's assertion that the District has allowed wholesalers to use out-of-District warehouses for decades is misleading. The pertinent facts in the record show only the Board granted two wholesalers permits to store beverages outside the District, one in 1979 and one for the 1993-1995 license period. Pet. App. 107a, 111a. As noted, the legislative history of the Storage Act shows that the Council considered the Board's actions to be ultra vires and enacted the Storage Act to prevent further abuses. When Kronheim made the same argument before the D.C. Circuit, it relied on D.C. Code § 25-112 and 23 D.C. Mun. Regs. § 1300 (1988), which only provide a very limited (and typical) exception to the three-tier distribution system, by allowing a retailer, on obtaining a special permit from the Board, to import beverages that are not available from District-licensed wholesalers in sufficient quantities to satisfy its immediate needs.

es, is based on fallacious reasoning. The need for a warehouse in the District is a practical incident of the requirement that a wholesaler store alcoholic beverages in the District before distributing them, which is integral to the District's ability to structure the liquor distribution system within its borders. The warehouse cannot logically be viewed in isolation from the alcoholic beverages stored in it.

Equally illogical is Kronheim's argument that the D.C. Circuit's decision gives the District the power to determine where Kronheim's trucks are garaged, where its computers are located, or where its workers reside.[19] Whereas the location in the District of an alcoholic beverage wholesaler's warehouse is critical to the District's legal ability to enforce the ABC Act and thereby to structure the liquor distribution system, the location of trucks, computers, or workers is not. As the Court observed in *State Board of Equalization of California v. Young's Market Co.*, *supra*, 299 U.S. at 64, "the question for decision requires no such generalization."

D. There is no conflict among federal or state appellate courts on the issues.

1. Kronheim's argument that the D.C. Circuit's decision "conflicts with decisions of the Second and Fifth Circuit that have interpreted *Bacchus* to limit Twenty-first Amendment immunity solely to those measures that serve substantial temperance-related purposes," Petition at 22, is without merit. Kronheim can only point to a statement in the district court's decision in *Loretto Winery Ltd. v. Gazzara*, 601 F.Supp. 850, 861 (S.D.N.Y.), *aff'd as modified sub nom. Loretto Winery Ltd. v. Duffy*, 761 F.2d 140 (2nd Cir. 1985). That case is

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[19]Unlike many states, the District has never had a residency requirement for alcoholic beverage licensees.

distinguishable because the state law in question did not purport to "structure the liquor distribution system"; rather, its "central purpose . . . was admittedly to promote the sale of 'New York labelled wines,'" 601 F.Supp. at 858, which alone could be sold in grocery stores rather than package stores. Moreover, the district court's statement--"[o]nly those state regulations which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment"--is a exceedingly narrow view, which is contrary to the text of Section 2 and to the numerous decisions of this Court quoted above. See pp. 11-13, *supra*. As noted, *Bacchus*, on which the district court relied, held that a state law could be justified not only "on the ground it was designed to promote temperance" but also on the ground that it was designed "to carry out *any other purpose* of the Twenty-first Amendment." *Id.*, 468 U.S. at 276 (emphasis added).

Moreover, contrary to Kronheim's assertion, the district court's reasoning in *Loretto Winery* was *not* "adopted in its entirety by the Second Circuit." Petition at 25. Rather, the Second Circuit only affirmed "[f]or *substantially* the reasons set forth" by the district court. 761 F.2d at 141 (emphasis added). The D.C. Circuit used the exact same language to describe the reasons for its affirmance, in an unpublished decision, of the district court in *Quality Brands, Inc. v. Barry*, *supra*. Yet, as the D.C. Circuit noted in the present case in rejecting Kronheim's collateral estoppel argument and in expressly overruling its decision in *Quality Brands*, such language "provided no clarity as to what was actually or necessarily determined on appeal." *Kronheim*, *supra*, 91 F.3d at 197; Pet. App. 6a. *See also*, *id.*, 91 F.3d at 205; Pet. App. 22a-23a (SILBERMAN, J., concurring). In any case, the Second Circuit in *Loretto Winery* had little need to adopt the district court's extreme statement because, as it noted, "[s]uch

clearly protectionists measures are violative of the commerce clause and, in light of *Bacchus* . . . cannot be saved by Section 2 of the Twenty-first Amendment." 761 F.2d at 141 (emphasis added).

Kronheim also relies on *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.), *cert. denied*, 114 S.Ct. 2675 (1994), but that case is easily distinguishable. There, the Fifth Circuit case struck down a three-year durational residence requirement for alcoholic beverage licensees--facts that do not remotely resemble the present case. Kronheim's analogy between Texas's interest in background checks and the District's interests in warehouse inspections is unconvincing. Whereas Texas can make a background check of a potential licensee in another state through long-distance inquiries or private investigators, under the ABC Act, the Metropolitan Police Department has no authority to enter an out-of-state warehouse to execute a subpena, the Corporation Counsel has no authority to seek an injunction in a foreign jurisdiction against operations of an out-of-state warehouse, and the Superior Court has no authority to declare an out-of-state warehouse a nuisance or close it down. Thus, unlike a residency requirement, the storage requirement plays a critical role in the District's power to structure the liquor distribution system within its borders.

Kronheim's reliance on *Indiana Wholesale Wine & Liquor Co. v. State ex. rel. Indiana Alcoholic Beverage Commission*, 662 N.E.2d 950, 997 (Ind.App. 1996), is surprising. That case, while similarly striking down a durational residency requirement, undercuts Kronheim's argument. While noting that "preservation of the states' ability to promote temperance is undoubted *one* of the 'core concerns'" of Section 2, *id.*, 662 N.E. at 966 (emphasis added), the court expressly rejects the argument based on *Loretto Winery* that it is the "sole" concern, stating that it "declined to adopt this very narrow read-

United States Supreme Court decisions subsequent to *Bacchus* on which *Loretto Winery* relied." *Id.*, 662 N.E.2d at 966 n. 27.

2. Kronheim argues that the D.C. Circuit is in conflict with other courts because it applied a "deferential, rational basis mode of review" in assessing the Twenty-first Amendment concerns addressed by the Storage Act. However, none of these cases applied the heightened scrutiny standard that Kronheim champions.[20]

In *Ivey v. Bacardi Imports, Co.*, 541 So.2d 1129 (Fla. 1989), the court invalidated a state tax scheme that gave preferences to alcoholic beverages manufactured from crops grown in Florida, closely analogous to the Hawaiian scheme giving tax preferences to local alcoholic products invalidated in *Bacchus*. Noting that "both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," *id.* at 1136, *quoting Hostetter*, *supra*, 377 U.S. at 332, undertook a "pragmatic effort to harmonize state and federal powers," *Midcal Aluminum*, *supra*, 445 U.S. at 109. The court in *Ivey* did not subject the states Twenty-first Amendment interests to heightened scrutiny, but merely determined that the those interests were "not substantial enough to outweigh the federal interest in free and unrestricted trade." 541 So.2d

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[20]As one commentator noted, "[a]nalysis of a validity of state law regulating liquor does not proceed via traditional route for testing constitutionality of state statutes. Rather courts must proceed from vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded comprehensive state regulatory scheme." Anno., *Extent of State Regulatory Power Under Twenty-first Amendment*, 34 L.Ed. 805 (Supp. 1996, at 16).

at 1137. The D.C. Circuit did not take a fundamentally different analytical approach. In holding that "the Storage Act both by its terms and according to its history is designed to advance the core enforcement purposes protected by section 2 of the Twenty-first Amendment," *Kronheim*, *supra*, 91 F.3d at 203; Pet. App. 18a, the Court essentially determined that these enforcement purposes were sufficiently substantial to override the federal interests protected by the Commerce Clause.

In *Heublein, Inc. v. Department of Alcoholic Beverage Control*, 237 Va. 192, 376 S.E.2d 77 (1989), the court invalidated a Virginia law prohibiting liquor distributors from unilaterally amending their agreements with Virginia wine wholesalers unless they made the same amendment with respect to their agreements with wholesalers in other states because, like the price affirmation law invalidated in *Brown-Forman Distillers v. New York Liquor Authority*, *supra*, the law's practical effect was to control liquor prices in other states in violation of the Commerce Clause. Contrary to Kronheim's argument, the court did not apply a heightened level of scrutiny to the state law. Kronheim argues that the court "noted that it had to apply 'careful scrutiny' to the State's asserted Twenty-first Amendment interests." Petition at 25. But this quote is taken out of context; the full quote has quite a different emphasis: "there is no bright line between federal and state powers over liquor. The competing state interest can be reconsidered only after careful scrutiny in a 'concrete case.'" 376 S.E.2d at 198, *quoting Midcal Aluminum*, *supra*, 445 U.S. at 110. Moreover, the court in *Heublein* did not subject the Virginia law to a heightened scrutiny. Instead, it started with the proposition that "every statute 'carries a strong presumption of validity.'" *Id.*, 376 S.E.2d at 195. It concluded, from an

examination of the legislative background, that the law's purpose was purely protectionist. *Id.* at 199.

Kronheim's reliance on *Indiana Wholesale Wine & Liquor Co.*, *supra*, is surprising. Relying on *North Dakota v. United States*, *supra*, the court held that "[i]t would seem unlikely that a 'strict scrutiny' approach analogous to that used in regular Commerce Clause cases would be appropriate, since to scrutinize state regulation of liquor that furthers the 'core concerns' of the Twenty-first Amendment under a strict scrutiny approach, would have the effect of seriously undermining the Twenty-first Amendment's special protection of state liquor regulation." 662 N.E. 2d at 966.

Therefore, Kronheim's argument that the D.C. Circuit is in serious conflict with other federal and state decisions is untenable. At most, Kronheim can point to a single statement by a district judge. There is no conflict for this Court to resolve.

* * *

In sum, the D.C. Circuit was clearly correct in upholding the constitutionality of the District's requirement that licensed wholesalers store alcoholic beverages that they import into the District at a location in the District before they distribute them widely to District retailers. The storage requirement, universal among the states, is clearly designed to advance the District's power to enforce its ABC laws and, thus, to structure the liquor distribution system within its borders. Hence, the Storage Act advances a core concern of Section 2 of the Twenty-first Amendment. The D.C. Circuit properly relied on the terms of the Act, its legislative history, and the adoption of a similar requirement by numerous states. The Act is supported by a strong presumption of validity, which Kronheim failed to overcome. There is no conflict between the

D.C. Circuit's decisions and any federal or state appellate courts. Therefore, the petition is without merit.

CONCLUSION

The petition should be denied.

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